INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	3
Argument:	
I. Jurisdiction and consent to be sued were withdrawn before the suit was brought	4
II. The present suit is not shown to have been filed in time	10
Conclusion	12
Appendix I. Statutes and regulations involved	13
Appendix II. Legislative history of the Act of March 20, 1933	19

CITATIONS

Cases:	
Beers v. *Arkansas*, 20 How. 527	7
Bryson v. *Hines*, 268 Fed. 290	8
Carpenter v. *United States*, 56 F. (2d) 828	11
Compagnie Generale Transatlantique v. *United States*, 51 F. (2d) 1053	11
Crouch v. *United States*, 266 U.S. 180, 8 F. (2d) 435	4
De Arnaud v. *United States*, 151 U.S. 483	12
De Groot v. *United States*, 5 Wall. 419	7
Finn v. *United States*, 123 U.S. 227	11
Hans v. *Louisiana*, 134 U.S. 1	6
Harris v. *United States*, 5 F.Supp. 368	4
Harrisburg, The, 119 U.S. 199	12
Hill v. *United States*, 149 U.S. 593	6
Louisville Cement Co. v. *Interstate Commerce Commission*, 246 U.S. 638	12
Mara v. *United States*, 54 F. (2d) 397	4
Miller v. *United States*, 57 F. (2d) 889	11
Schillinger v. *United States*, 155 U.S. 163	6
United States v. *Babcock*, 250 U.S. 328	6
United States v. *Densmore*, 58 F. (2d) 748	11
United States v. *Lee*, 106 U.S. 196	8
United States v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608	4
United States v. *Pfitsch*, 256 U.S. 547	4
Western Fuel Co. v. *Garcia*, 257 U.S. 233	12

Statutes: Page

Act of October 6, 1917, c. 105, 40 Stat. 398, 409, 410:
Sec. 400 13
Sec. 401 13
Sec. 402 14
Sec. 403 14
Sec. 404 14
Sec. 405 15
Act of June 7, 1924, c. 320, 43 Stat. 608, 612:
Sec. 5 as amended 16
Sec. 19 as amended 16
Act of July 3, 1930, c. 849, 46 Stat. 991, 992:
Sec. 1 17
Sec. 4 17
Act of March 20, 1933, c. 3, 48 Stat. 8, 9, 11:
Sec. 5 17
Sec. 17 17
Tucker Act (Judicial Code, Sec. 24 (20), U.S.C., Title 28, Sec. 41 (20) 18

Miscellaneous:
Bulletin No. 1, promulgated by Director of the Veterans' Bureau on October 15, 1917 15
H.Rept. No. 1, 73d Cong., 1st Sess., March 11, 1933, pp. 5–6 19
S.Rept. No. 1, 73d Cong., 1st Sess., March 11, 1933, pp. 4–5 20
Cong. Rec. Vol. 77, Pt. 1:
Page 199 19
Page 276 20
Page 355 20
Pages 364–365 21
Page 471 21
Page 551 21
Page 561 22

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 24–25) is reported in 67 F. (2d) 490.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 3, 1933. (R. 26.) A petition for rehearing was denied December 14, 1933. (R. 28.) The petition for a writ of certiorari was filed March 12, 1934, and granted April 9, 1934. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 17 of the Economy Act of March 20, 1933, *infra,* p. 17, deprived the courts below of jurisdiction to entertain a suit against the United States on a contract of yearly renewable term insurance issued under the War Risk Insurance Act of 1917.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix I, *infra,* pp. 13–18.

STATEMENT

The petitioner filed this suit in the District Court April 21, 1933, to recover death benefits alleged to be due her as the beneficiary designated in the contract of yearly renewable term insurance issued to her son Thomas Stephen Lynch during service in the United States Army between May 30, 1918 and an undesignated date in the year 1919. (R. 1.)

The petition alleged that Thomas Stephen Lynch, the insured, died November 27, 1924; that although no premiums had been paid on his insurance since July, 1919 the insured became permanently and totally disabled and the insurance thereby matured prior to September 1, 1919, the date on which the grace period expired. (R. 2.)

The petitioner further alleged that she had "made due proof" of the insured's death and requested payment of benefits but that on March 29, 1933, the Director of Insurance of the Veterans' Administration advised her by letter that further consideration of her claim was barred by the Economy Act of 1933. She claimed that this Act was unconstitutional and void on various grounds set forth in the petition. (R. 2–5, 7–10.) The respondent demurred to the petition and the demurrer was sustained by the District Court. (R. 17.) On appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the District Court was affirmed on the ground that the Economy Act, repealing all war risk term insurance laws and withdrawing the Government's consent to be sued thereunder, had deprived the District Court of jurisdiction. (R. 24–25.) A petition for rehearing was filed and denied. (R. 26–28.)

SUMMARY OF ARGUMENT

1. Jurisdiction of the case, and the consent of the defendant to be sued, were withdrawn by the Act of 1933 before the suit was brought.

2. The petition fails to show that the suit was filed in time under the prior law.

ARGUMENT

I

JURISDICTION AND CONSENT TO BE SUED WERE WITHDRAWN BEFORE THE SUIT WAS BROUGHT

Jurisdiction was refused below because of Sections 5 and 17 of the Economy Act of March 20, 1933, *infra*, p. 17. (R. 25.)

Section 5 does not concern war risk insurance, and Section 17 is the controlling section. By that section "all laws granting or pertaining to yearly renewable term insurance [1] are hereby repealed", with certain saving provisos which do not include this case. The repeal includes the section under which suits on such policies have hitherto been brought in District Courts (World War Veterans' Act, 1924, Sec. 19, as amended by Act of July 3, 1930, c. 849, 46 Stat. 991, 992, *infra*, p. 16) and under which this suit was brought.[2] The repeal

[1] Such insurance should not be confused with the permanent converted insurance policies issued subsequently to the war to yeterans who elected to convert their temporary wartime insurance into a permanent form of Government insurance. The Act of March 20, 1933, does not affect the latter form of insurance.

[2] It was well settled, prior to the passage of the Act of 1933, that jurisdiction of suits on war risk policies was under the section cited, and not under the Tucker Act, and that, therefore, the plaintiff was entitled to a jury trial. *United States* v. *Pfitsch*, 256 U.S. 547, 552–553; *Crouch* v. *United States*, 266 U.S. 180, 8 F. (2d) 435; *United States* v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608; *Mara* v. *United States*, 54 F. (2d) 397, 399. *Contra*, *Harris* v. *United States*, 5 F. Supp. 368 (D.C. Idaho). This suit is

preceded the filing of the present suit.[3] The situation, therefore, is that at the time the present suit was filed the only law under which jurisdiction of it was conferred upon the court had already been repealed. The court, therefore, held correctly that it had no jurisdiction.

It is clear, and not seriously disputed, that this is the meaning of the Act of 1933. That it was also the purpose of Congress is made clear by the Congressional history which we summarize in Appendix II, *infra,* pp. 19–22. The question, therefore, is the power of Congress to withdraw the jurisdiction previously given, and to terminate, before the suit was brought, the consent of the United States to be sued in such a case.

Petitioner complains that the Act of 1933 has wholly confiscated his rights under an insurance contract by repealing all the laws that grant them; but by the same Act of which he complains the courts were deprived of all jurisdiction to entertain his complaint. If such withdrawal of jurisdiction is valid, the alleged effect of the Economy Act upon petitioner's asserted contract rights can-

---

expressly brought under the World War Veterans' Act (R. 1), and the plaintiff asks a jury trial (R. 11). It could not, in any view, have been brought under the Tucker Act, because the claim exceeds $10,000 (R. 11), and also because the right accrued either in 1919 or 1924 (R. 2) and the suit was not brought within 6 years thereafter. (R. 1.) Judicial Code, Sec. 24 (20); U.S.C., Title 28, Sec. 41 (20), *infra,* p. 18.

[3] The repeal became effective March 20, 1933, 48 Stat. 8, 11, 16. The suit was instituted April 21. (R. 1.)

not be considered. The unqualified right of Congress to withdraw the consent of the United States to be sued is clear from previous decisions of this Court. It has been held that the United States when it creates a right against itself is under no obligation to provide a remedy through the courts. *United States* v. *Babcock*, 250 U.S. 328. This is true of contract rights as well as others. In *Hans* v. *Louisiana*, 134 U.S. 1, it was said (p. 13):

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

Even if a violation of the Constitution by the United States were involved a right of action therefor against the Government is not conferred thereby. In *Hill* v. *United States*, 149 U.S. 593, jurisdiction to determine whether the United States had violated the Fifth Amendment in appropriating plaintiff's property was expressly declined on the ground that the alleged taking sounded in tort and that the United States had not consented to be sued in tort, and in *Schillinger* v. *United States*, 155 U.S. 163, 168, this Court said:

> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the

> United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

Moreover, it would seem immaterial that consent was previously given, for, as was pointed out by Chief Justice Taney in *Beers* v. *Arkansas,* 20 How. 527, 529, as permission to sue "is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions under which it consents to be sued * * * *and may withdraw its consent* whenever it may suppose that justice to the public requires it." (Italics ours.)

In *De Groot* v. *United States,* 5 Wall. 419, dealing with the Court of Claims, this Court said (p. 432):

> It is true that ordinarily, when we seek for the foundation of this jurisdiction, we

> look to the general laws creating the court, and defining causes of which it may have cognizance. But is equally true that whenever Congress chooses to withdraw from that jurisdiction any class of cases which had before been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as to a class of cases, must rest on the same foundation; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the government.

There is no difference, we submit, between an asserted violation of the Fifth Amendment involving a contractual obligation and one which does not; nor does a different situation arise where the right to sue is withdrawn from that which arises when it has never been conferred.

Of course, where a right has vested in an individual to sue one other than the United States, Congress may be without power to remove that right. Its absolute power to take away a right to sue applies only where the suit is against the Government. This power is inherent in the status of the Government as a sovereign. *United States* v. *Lee*, 106 U.S. 196, 206. The distinction is illustrated in *Bryson* v. *Hines*, 268 Fed. 290 (C.C.A. 4th), where

actions were brought by the administrators of two soldiers against a railroad and the Director General of Railroads for damages on account of the deaths of the soldiers alleged to have been due to the negligence of the defendants. The defense set up was that a circular issued by the Director General after the cause of action accrued deprived the plaintiffs of the right to sue. The court said (p. 295):

> As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Company, for it existed and was a vested right before that circular was issued. The right of action had also accrued against the Director General under the federal statutes and proclamations of the President, if the train was negligently run. As the Director General was an officer of the government, the right of action was in effect against the government, and was dependent upon the permission and grant of the government found in these statutes and proclamations. *This permission and grant could, of course, be withdrawn at any time before the judgment.* (Italics ours.)

In short, whatever power Congress may have had over the petitioner's contract, directly, it clearly had the power to close the courts. Having done that before the suit was brought, it follows that the District Court had no jurisdiction of the case, and both courts below have properly so held.

II

THE PRESENT SUIT IS NOT SHOWN TO HAVE BEEN FILED IN TIME

The complaint in the case at bar also lacks a jurisdictional prerequisite under Section 19 of the Act of 1924 (*infra*, p. 16) as the section stood before it was repealed. It fails to show that suit was filed within the time limited by that section, which provided:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

This suit was filed April 21, 1933, more than "six years after the right accrued for which the claim is made" (R. 2) and more than one year after July 3, 1930, the date of approval of the amendatory Act, (46 Stat. 992) and thus is barred unless the limitation on suit was suspended by the consideration of the claim in the Bureau. The complaint does not show the date claim was filed

in the Bureau and therefore does not allege a fact essential to the determination of the court's jurisdiction. *Miller* v. *United States*, 57 F. (2d) 889 (E.D.N.Y.). The complaint does allege that "your petitioner made due proof of said death to the defendant, * * * and requested payment of aforesaid amounts" (R. 2); but the date of such claim is not stated although essential to the determination of jurisdiction. And further, the allegation of "due proof" relates solely to death whereas the claim was wholly dependent on the alleged total permanent disability without which the insurance would have lapsed. *United States* v. *Densmore*, 58 F. (2d) 748 (C.C.A. 9th).

It is immaterial that this defect was not pleaded, and was apparently not brought to the attention of, nor considered by, either of the courts below. It is held that the provisions of Section 19 as to time are not a statute of limitations, but go to the jurisdiction of the court. *Miller* v. *United States*, 57 F. (2d) 889, 890 (E.D.N.Y.). This is in accord with decisions as to the effect of the six-year provision of the Tucker Act (*infra*, p. 18), *Compagnie Generale Transatlantique* v. *United States*, 51 F. (2d) 1053, 1056 (C.C.A. 2d); *Carpenter* v. *United States*, 56 F. (2d) 828 (C.C.A. 2d); as well as with decisions as to the similar provisions in the Acts conferring jurisdiction on the Court of Claims. *Finn* v. *United States*, 123 U.S. 227. Since a failure to sue in time is in such cases jurisdictional, it need not be pleaded, and is available at any time. *Finn*

v. *United States, supra,* at pp. 232–233; *Carpenter* v. *United States, supra,* at p. 829; *De Arnaud* v. *United States,* 151 U.S. 483, 495–496. See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638, 642; *The Harrisburg,* 119 U.S. 199, 214; *Western Fuel Co.* v. *Garcia,* 257 U.S. 233, 242–243.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
WILLIAM STANLEY,
The Assistant to the Attorney General.
WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
CHARLES BUNN,
Special Assistants to the Attorney General.

MAY 1934.

APPENDIX I

STATUTES AND REGULATIONS

The Act of October 6, 1917, c. 105, 40 Stat. 398, 409, 410, provides in part as follows:

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000, upon the payment of the premiums as hereinafter provided.

SEC. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such

service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum.

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms

of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

SEC. 405. That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. * * *

Bulletin No. 1 was promulgated by the Director on October 15, 1917, and provides in part as follows:

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of

service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

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which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract: * * *.

The Act of October 6, 1917, *supra,* was amended by the Act of June 7, 1924, c. 320, 43 Stat. 612 (U.S.C., Title 38, Section 445.) After several intermediate amendments the Act of June 7, 1924, was amended by the Act of July 3, 1930 (c. 849, 46 Stat. 991, 992), to read in part as follows:

> SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; * * *.
>
> SEC. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> * * * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within

six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

The Act of March 20, 1933 (c. 3, 48 Stat. 8, 9, 11), known as the Economy Act, provides in part as follows:

SEC. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

SEC. 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby, repealed, * * * *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *.

The Tucker Act (Judicial Code, Section 24 (20), U.S.C., Title 28, Section 41 (20)) provides in part as follows:

> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

APPENDIX II

LEGISLATIVE HISTORY OF THE ACT OF MARCH 20, 1933, C. 3, 48 STAT. 8

The bill (H.R. 2820) was introduced in the House. As introduced, Section 17 provided (Cong. Rec. Vol. 77, Part 1, p. 199):

> all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the first day of the third calendar month following the month during which this act is enacted. * * * *Provided*, that nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this act and under which payments have been commenced.

The bill was referred to the Committee on Economy, and the report of that Committee gave the following explanation of Section 17 (73d Cong., 1st sess., House Report No. 1, March 11, 1933, pp. 5–6):

> This section [Sec. 17] further repeals all laws granting or pertaining to yearly renewable term insurance, including the right to institute suit or further proceed with suits under section 19 of the World War veterans' act, 1924, as amended. * * * It is further provided that payments under contracts of yearly renewable term insurance, which matured prior to the date of the enactment of this Act and under which payments

> have been commenced, shall continue in accordance with the terms of such contracts. No new awards can be made or new payments commenced on yearly renewable term insurance under the terms of this section.
>
> Further adjudications of claims will not be permitted and all pending claims and suits are required to be dismissed. Under the provisions of this section, payment of benefits under the laws existing at the date of repeal are to continue to the first day of the third calendar month following the date of enactment.

The bill was passed by the House with the section in this form.

A bill similar to the House bill was introduced in the Senate and referred to the Finance Committee. The Finance Committee made a report in the same words as the report of the House Committee as to Section 17. (73d Congress, 1st Session, Senate Report No. 1, March 11, 1933, pp. 4–5.)

When the bill passed by the House reached the Senate, it was substituted for the Senate bill (Cong. Rec. Vol. 77, Part 1, p. 276).

The bill as passed by the House did not save pending suits on contracts of War Risk Insurance, and Senator Black introduced the following amendment to Section 17 (p. 355):

> Nor on any judgment heretofore rendered in a court of competent jurisdiction, or which may hereafter be rendered in any suit now pending.

Senator Harrison introduced a substitute for Senator Black's Amendment, which would have saved only cases in which there had been a trial prior to the enactment of the Act. (P. 355.) Sena-

tor Black in commenting on these two proposed amendments, after referring to the fact that the bill as passed by the House did not permit a soldier to collect the judgment he had obtained, said (p. 355):

> The amendment which the Senator from Mississippi now proposes, and which I shall favor if my amendment shall not be agreed to, provides that if a judgment has already been obtained the soldier can proceed to collect the judgment irrespective of the law. But it does not save the thousands of other contractual obligations upon which suits have already been filed in the Federal courts of the United States on policies of insurance bought and paid for by the veterans of the World War.
>
> * * * * *
>
> The amendment which I offer does not add a dollar to any compensation; * * *
> It simply provides where suits have been filed on contractual obligations, on these policies, that the courts shall be permitted to pass upon the claims based upon the contracts of insurance.

After some further debate Senator Black modified his amendment so that it reads as it now appears in the statute, and the Senate agreed to this amendment and rejected the amendment of Senator Harrison (pp. 364–365). As thus amended the Bill passed the Senate on March 15, 1933 (p. 471).

When the bill as amended, reached the House, the Senate amendment was explained as follows (p. 551):

> Amendment No. 19 (p. 10): This amendment saves from the effect of the repeal of the laws pertaining to yearly renewable

term war-time insurance suits filed in the courts and pending at the time of enactment of the act. All other claims are automatically barred from any future consideration. The House bill barred also pending suits from further consideration by the courts, but the Senate amendment permits such suits filed prior to the enactment of this act to continue to final judgment.

The amendment was concurred in by the House (p. 561) and the bill passed and was signed by the President on March 20, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1934

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Certain contentions made in the reply brief of the petitioner in this case require a further answer.

I

Petitioner contends that "The writing of war risk term insurance by the Government as provided by Act of Congress was not the exercise of a sovereign power" (reply brief, p. 2).

The first case cited under this contention, *Standard Oil Company* v. *United States,* 267 U.S. 76, related to a policy of marine insurance, issued in

56791—34

1915 under the Act of 1914, and on which a loss occurred in 1915. The United States was not then at war, and the insurance was a mere accommodation to the shipping interests, who found it difficult to get insurance against war risks from commercial companies. The quotation at page 2 of the reply brief from page 79 of the opinion relates merely to the question whether interest should be allowed.

The present insurance, issued originally under the Act of October 6, 1917, was clearly issued under the war powers, in particular under the power of Congress to raise and support armies. Whatever was done by Congress to pay, support, or improve the morale of its soldiers in war time was done as a sovereign and not as a matter of business.

It is not believed, however, that the distinction is of great importance, for this Court has held, in the four cases referred to below, that States may validly withdraw permission for suits against themselves, even in business contracts.

The second quotation on page 2 of the reply brief is from the dissenting opinion in the *Sinking Fund Cases,* 99 U.S. 700. The majority of the Court held in those cases that the Act of 1878 was valid, notwithstanding that it changed in an important way the contract relations previously existing between the United States and the Union Pacific Railroad Company.

II

The petitioner contends that "The Government may not withdraw the right to sue in the case at bar, because such withdrawal impairs the obligation of plaintiff's war risk insurance contract" (reply brief, p. 3).

The three cases cited under this contention, on page 3 of the reply brief, have no bearing on the case at bar. In none of them was any government, except the City of Quincy, Illinois, involved, and in none of them was there suggested a withdrawal of the right to sue a sovereign. All three were suits on debts, by private parties, against private parties and a city.

The Contract Clause (Article I, Sec. 10) does not bind the United States. The Fifth Amendment does. But it is certainly no stricter than the Contract Clause, and it may be doubted if it is as strict. If, then, this Court has held that States, with outstanding valid contract rights againts them, and with statutes permitting their creditors to sue, may validly repeal those statutes, and stand upon their sovereign immunity from suit, without violation of the Contract Clause, it follows necessarily that the United States may do the same, without violation of the Fifth Amendment. This Court has so held, as to States, in four decisions. *Railroad Company* v. *Tennessee,* 101 U.S. 337; *Railroad Company* v. *Alabama,* 101 U.S. 832; *Baltzer* v. *North Carolina,*

161 U.S. 240; *Baltzer & Tanks* v. *North Carolina*, 161 U.S. 246. See also *In re Ayers*, 123 U.S. 443, 505. In the *Tennessee* case the obligation sued on was a debt of the Bank of Tennessee, guaranteed by the State. In the *Alabama* case it was a part of the State's "three percent fund." In the first *North Carolina* case it was a group of railroad aid bonds. In all four cases the States was suable, by statute, when the claims were acquired by the respective plaintiffs, and in the *Alabama* case this condition continued until after the suit was brought. The Alabama statute further made it the duty of the Comptroller, upon a judgment and a certificate by the Judge and the Clerk of Court that the recovery was just, "to issue his warrant for the amount." In each of the four cases the State withdrew permission to be sued before the plaintiff got a judgment, and in each of them this Court determined that it had that power, and that its action did not violate the Contract Clause.

The basis of these four decisions, that the judicial remedy provided did not contain provision for execution of the judgment and so might be validly withdrawn, is exactly applicable to suits against the United States on money claims. Under the Constitution, Article I, Section 9, no "money shall be drawn from the Treasury but in consequence of an appropriation made by law." Accordingly, the law provides for a report of judgments against the United States to Congress (Judicial Code, Sec.

143; U.S.C., Title 28, Sec. 248) and Congress appropriates to pay them. Congress sometimes does not pay them all (33 Stat. 422, "except the two judgments in favor of the Coca Cola Company"; 40 Stat. 378, "except the judgment in favor of the Louisville & Nashville Railroad Company"), and when it does not no court has power to make it. As Chief Justice Waite said, in denying the petition for rehearing in *Railroad Company* v. *Alabama*, 101 U.S. 832, 835:

> The case is precisely like that of a judgment in the Court of Claims against the United States. By the Constitution of the United States no "money shall be drawn from the treasury but in consequence of appropriations made by law." Art. 1, sec. 9. Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had.

The four decisions noted cannot be distinguished from the present case, and they require an affirmance of the judgment.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

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